IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR
ORDER
D.B. Civil Special Appeal (W) No.582/07
In
S.B. Civil Writ Petition No.182/06
Uma Shankar & Ors.
Vs.
State of Rajasthan & Ors.

Date of Order :: 8th May, 2007

HON'BLE THE CHIEF JUSTICE SHRI S.N. JHA
HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

REPORTABLE

Shri K.K. Mehrishi, Senior Advocate assisted by Shri Timan Singh for appellants.

(Per–Hon'ble Shri Mohammad Rafiq, J.)

This appeal is directed against the judgment of learned Single Judge dated 3.8.2006 whereby the writ petition of the appellants filed against the judgment of the Board of Revenue dated 24.10.1994 was dismissed. The Board of Revenue in that judgment had upheld the

judgment of Revenue Appellate Authority, Kota which while partly allowing the appeal of the respondent nos.5 set aside the judgment / decree dated 5.1.1994 passed by Assistant Collector, Kota in her suit filed u/s. 183 of the Rajasthan Tenancy Act, 1994 (for short `the Act') thereby directing him to first decide the proceedings initiated by the land holder under Section 175 of the Act.

Factual matrix of the case is that the ancestral land of the appellants bearing khasra no.149 measuring 23 bighas is situated in village Rajnagar, Tehsil Ladpura, District Kota. Originally this land was entered in the khatedari of Narayan and upon his death, in the name of his son Mangi Lal who expired on 25.9.95. Mangi Lal being father of the

appellants herein, they in their capacity as his legal heirs and successors are claiming this land. The said Mangi Lal sold this land for a sale consideration of Rs.28,000/- to the respondent no.5 Smt. Vishnu Kant in the year 1974. In the course of time, the respondent no.5 transferred this land in favour of Shri Ved Mata Gayatri Trust, Kota i.e. Respondent no.6 herein. According to the appellants, Mangi Lal being Karta of the family could not have sold this land against the interests of other members of the family and much less without their consent. Besides, this transfer was void in view of the bar contained in clause (b) of section 42 of the Act according to which land owned by a member of Scheduled Caste could be sold to a member of

Scheduled Caste only and none else. When Mangi Lal realised his mistake, he filed a revenue suit under Section 183 read with clause (b) of section 42 of the Act against respondent no.5 before Assistant Collector, Kota on 25.5.76 on the premise that the sales / transfer was void ab initio and therefore respondent no.5 was liable to be ejected from such land treating her to be a trespasser. The respondent no.5 contested the matter asserting that she was bona fide purchaser of the land having paid sale consideration therefor to the said Shri Mangi Lal. In the alternative, however, she claimed back the amount of sale price. During the pendency of the said suit, Tehsildar Ladpura in his capacity as the land holder, in the meaning of

section 2(26) of the Act, filed an application before the Assistant Collector, Kota on 1.1.94 stating therein that he had already initiated action against respondent no.5 and the plaintiff in the year 1976 for recovery of possession of the said land in accordance with the provisions of Section 175 of the Act. The Assistant Collector however passed a judgment / decree in favour of Shri Mangi Lal vide his order dated 5.1.94. When the judgment was challenged before the Revenue Appellate Authority, the Authority vide its judgment dated 11.4.1994 directed that the Assistant Collector should first decide the application filed by the Tehsildar u/s. 175 of the Act and on that premise, set aside the judgment and decree dated

5.1.94 and remanded the matter back to him. It is this judgment which was later upheld by the Board of Revenue and also by the learned Single Judge. Hence this special appeal.

We have heard Shri K.K. Mehrishi, Senior Advocate assisted by Shri Timan Singh for the appellants and perused the material on record.

Shri K.K. Mehrishi, learned counsel for the appellants argued that the learned Single Judge has failed to correctly appreciate the provisions of Section 175 in as much as when the final judgment had been passed in the suit filed by the appellants under Section 183, mere pendency of application under Section 175 would not be a ground to annul the judgment and decree so passed.

He argued that the sale made by Mangi Lal on 26.4.1994 was void ab initio and therefore possession of the transferee i.e. respondent no.5 over the disputed land was in the capacity of trespasser who was liable to be ejected by recourse to Section 183 of the Act. The transferee obtaining possession under a void transaction of sale was liable to be treated as trespassers and suit for her ejectment under Section 183 of the Act was maintainable. Shri Mehrishi argued that Mangi Lal sold the land to respondent no.5 but later realizing that the sale being in violation of Section 42 (b) of the Act was void, filed a suit for recovery of possession. The transaction of sales being void, no title ever stood transferred to the respondent no.5. Shri

Mehrishi in the course of arguments sought to make a distinction between void and voidable contract for sale and argued that in view of law contained in Section 42 of the Act, the transaction of sale in question was void and therefore no formal declaration for its being void was necessary and therefore as per the provisions of Section 183 of the Act, the transferee would be treated to have taken or retained possession of the land without lawful authority and application under Section 183 for his ejectment was therefore maintainable. It was argued that learned Single Judge committed an error of law in holding that apart from the transferee of the land, Mangi Lal, the predecessor in title of the appellants, being transferor, was equally

responsible for violation of Section 42 of the Act and was also liable to be ejected from the land in question. It was argued that the learned Single Judge has misconstrued and misinterpreted the definition of trespasser as given in Section 5(44) of the Act. There was a clear distinction between a transferor and a holder of the land, therefore, it was an illegal transaction. Shri Mehrishi argued that the bar of clause (b) of Section 42 of the Tenancy Act having been inserted by amendment w.e.f. 1.5.64, it could never be the intention of the legislature to apply Section 175 of that Act to a transaction of sale which was void ab-initio and was deemed never to have taken place. Section 42(b) of the Act intended to protect interest of

weaker sections of the society, therefore, contrary to the intention of the legislature, section 175 could not be applied to such transactions and the transferee in such situation could legitimately proceed against the transferor u/s. 183 of the Act to recover his lost possession because in view of clause (b) of section 42 of the Act, the transferee is liable to be treated as trespasser. It was argued that Section 175 presupposes the transfer by a tenant of his holding otherwise than in accordance with the provisions of the Act and in the present case the sale transaction in question being void ab initio, there in fact no transfer took place in the eye of law and as such, provisions of Section 175 would not be

applicable. Shri Mehrishi in order to further develop this argument, went in so far as to argue that the revenue courts had no jurisdiction to recognize a transfer which is void on account of violation of Section 42 and when such transfer is not recognizable in law, it cannot be said to have at all taken place in law so as to attract the provisions of section 175, even if possession of the land pursuant to such void transaction had changed hands. Shri Mehrishi in support of his arguments relied on the division bench judgment of this Court in Babu Singh Vs. State of Rajasthan & Ors., 2002 (1) WLC (Raj.) 490 and single bench judgment in Kamad & Ors Vs. Board of Revenue & Ors., RLR 1985 553.

We have given out thoughtful

consideration to the arguments advanced by learned counsel for the appellants and perused the impugned judgments and the material on record.

Since the controversy involved in this matter centers around the interpretation of provisions of Section 42, 175 and 183, we consider it appropriate to reproduce those provisions hereunder for the facility of reference:-

> **42.General restrictions on sale, gift & bequest-**
> The sale, gift or bequest by a Khatedar tenant of his interest in the whole or part of his holding shall be void, if
>
> [XXX(a)..... deleted w.e.f. 11.11.1992 XXX]
>
> (b)such sale, gift or bequest

is by member of a Scheduled Caste in favour of a person who is not a member of the Scheduled Caste, or by a member of a Scheduled Tribe in favour of a person who is not a member of the Scheduled Tribe.

[(bb) such sale, gift or bequest, notwithstanding anything contained in clause (b), is by a member of Saharia Scheduled Tribe in favour of a person who is not a member of the said Saharia tribe.]

175. Ejectment for illegal transfer or sub-letting-[(1)] If a tenant transfers or sub-lets, or executes an instrument purporting to transfer or sub-let, the whole or any part of his holding otherwise than in accordance with the provisions of this

Act and the transferee or sub-lessee or the purported transferee or sub-lessee has entered upon or is in possession of such holding or such part in pursuance of such transfer or sub-lease, both the tenant and any person who may have thus obtained or may thus be in possession of the holding or any part of holding, shall on the application of the landholder, be liable to ejectment from the area so transferred or sub-let or purported to be transferred or sub-let.

183. Ejectment of certain trespassers-(1) Notwithstanding anything to the contrary in any provision of this Act, a trespasser who has taken or retained possession of any land without lawful authority shall be

> liable to ejectment, subject to the provision contained in sub-section (2), [on the suit of the person or persons entitled to eject him] and shall be further liable to pay as penalty for each agricultural year, during the whole or any part whereof he has been in such possession, a sum which may extend to fifteen times the annual rent.”

Whole gamut of the argument advanced by learned counsel for the appellants proceeds on the assumption that clause (b) of Section 42 having been brought on the statute book by way of amendment later in point of time than Section 175, which was engrafted in the Act when it was originally enacted in the year 1955, intention of the legislature

was to treat such sale transactions effected in violation of clause (b) of Section 42 as void and not voidable and therefore transfer which is void from inception, cannot be treated as a transfer in the sense in which it has been referred to in Section 175. Section 175 for this reason cannot be applied to such sale transaction. The argument in substance is that the predecessor-in-title of the appellants having realized his mistake that the transaction of sale was void in view of the bar contained in Section 42(b) filed a suit u/s. 183 for recovery of the possession as the sales being void, the transferee was liable to be treated as trespasser and he could recover the possession of the land in dispute in proceedings u/s. 183 of the

Act. We are not persuaded to uphold this kind of interpretation and the line of reasoning underlying such an argument. Relevant clause (b) of section 42, no doubt, was brought on statute book by the Rajasthan Tenancy (Amendment) Act No.12 of 1964 which came into force on 1st May, 1964 providing that sale, gift or bequest by a khatedar tenant of his interest in the whole or part of his holding shall be void if such sale, gift or bequest is by a member of Scheduled Caste in favour of a person who is not a member of the Scheduled Caste and declared such transaction as void. But then, the legislature cannot be presumed to be oblivious of the pre-existing provisions in the same enactment namely Section 175, which categorically provides that “if a

tenant transfers or sub-lets or executes an instrument purporting to transfer or sub-let, the whole or any part of his holding otherwise than in accordance with the provisions of this Act and the transferee or sub-lessee or the purported transferee or sub-lessee has entered upon or is in possession of such holding or such part in pursuance of such transfer or sub-lease both the tenant and any person who may have thus obtained or may thus be in possession of the holding or any part of holding, shall on application of the landholder, be liable to ejectment from the area so transferred or sub-let or purported to be transferred or sub-let."

We find it difficult to approve of the other argument either, which the

learned counsel has advanced to distinguish voidable transactions form the void ones and on that basis argued that since transferee would be taken to have retained possession without the lawful authority, he would be liable to be treated as trespasser in the meaning of Section 183 of the Act and therefore, could be summarily ejected from the holding by recourse to that provision. In our considered opinion, the three provisions namely Section 42, 175 and 183 shall have to be harmoniously construed in such a way so as to make the Act of 1955 a workable piece of legislation. So construed, we find that while Section 175 operates in a different sphere and can be pressed into service independent of Section 183 by the land holder who can

under that provision secure ejectment of both transferor and transferee, proceeding under section 183 however can be initiated by any affected party which is directed against the trespasser who holds the possession at the given point of time without lawful authority. And when proceedings initiated under sections 175 as well as 183 were there before the revenue Court, the right of land holder being superior in nature and proceedings u/s. 175 being directed against both the transferor and the transferee, such proceedings were entitled to precedence over those under section 183. Learned Revenue Appellate Authority, in our considered view, therefore, did not commit any error of law in directing the first court to decide those proceedings

first. Section 175 categorically provides that if a tenant transfers the whole or any part of his holding, otherwise than in accordance with the provisions of the Act, he shall, on application of the landlord, be liable for ejectment. Violation of clause (b) of Section 42 would also be therefore covered within the sweep of “otherwise than in accordance with the provisions of this Act” as contained in Section 175, supra. Merely because clause (b) of Section 42 was inserted by way of amendment in the Act later in point of time, it is not liable to be excluded from the purview of Section 175. This is the interpretation which flows from plain reading of the language used in Section 175 Act so as to cover the transfer of the land otherwise than in

accordance with the provisions of this Act namely in violation of any of its provisions and is fully in conformity with the intention of the legislature. Had the legislature intended otherwise or if it wanted to exclude the void transfers covered by Section 42 from the purview of Section 175, it would have certainly indicated so and when the legislature has not specifically indicated so, nothing that does not flow from the plain language used in Section 175 can be attributed to the supposed intention of the legislature just because clause (b) of section 42 was inserted by way of amendment later in point of time than the original enactment.

A division bench of this court in Ram Chandra Vs. Om Prakash, 1978 RLW 442

has although taken a view that a sale in contravention of section 42(b) of the Act being forbidden by law would be void contract within the meaning of Section 25 of the Indian Contract Act and not enforceable in law. But the fact that it was a void transaction and not voidable would not make any difference as to maintainability of the proceedings u/s 175 of the Act because every transfer made by whatever mode if is in violation of any provision of the Act and is also void for that reason, would necessarily be hit by section 175 of the Act making the transferee liable to ejectment by recourse to that provision in the proceeding initiated by the land holder.

Reliance placed by the learned counsel on the division bench judgment of

this Court in Babu Singh vs State of Raj. & Ors. is wholly misplaced, rather what has been held in that case falls in line with the view which we have taken of the matter as would be evident from para 9 of the judgment, which it would be appropriate to quote hereunder:-

> “9. Section 175 enables the land-holder to make an application before competent authority to eject both the tenant and his transferee. This is indicative of the scheme that by indulging in transfer of his tenancy rights contrary to Section 42, a member of schedule caste or scheduled tribe too becomes liable to be ejected alongwith transferee in possession. It may be noticed that such right of evicting both tenant and transferee is conferred only in case the

transfers in contravention of Sec.46A is put in possession. Otherwise, if possession of land is not transferred, Section 175 does not come into operation. This is further indicative of the fact that while transfer in breach of clause (b) of proviso to Section 42, does not affect as such tenancy rights of Khatedari tenant, but if he parts with possession, he too becomes liable to be ejected from his tenancy rights and on such ejection order made his tenancy light come to an end. Therefore, dispossession of a transferee is not automatic whenever a complaint is made that he is in possession under a void transaction. On such transfer though a tenant is not immediately diverted of his tenancy right immediately, but

> he can be ejected by the State; if he has parted with possession, along with transferee, which ensures that he does not become beneficiary of proceedings under Section 175. His failure to recover possession within the time prescribed for taking proceeding for recovery of possession, also results in extinguishment of his right.”

Now, the other single bench judgment in Kamad, supra, relied on by the learned counsel, of course held proceeding u/s 183 of Act for recovery of possession of the land transferred pursuant to a sale transaction in violation of section 42(b) as maintainable, but the ratio of that judgment cannot be applied to the present

case for the simple reason that proceedings u/s 175 were not initiated in that case and therefore the question which arises for our consideration in this case was in fact not at all raised in that case.

In our considered view, therefore, the impugned judgments passed by any of the revenue courts and for that matter, the judgment of learned Single Judge impugned herein, do not suffer from any legal infirmity.

The appeal being devoid of merits is therefore dismissed.

(Mohammad Rafiq),J. (S.N. Jha),CJ.

RS/-

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For kind perusal of Hon'ble the Chief Justice.

(MOHAMMAD RAFIQ)